

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PROLOGIS NA3 NV II, LLC,

Plaintiff,

vs.

IGT, Inc.,

Defendant.

3:11-cv-00346-HDM-WGC

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW;
ORDER**

This case was tried before the court sitting without a jury commencing November 18, 2013. The court has considered the testimony of the witnesses, the exhibits introduced during trial, and the arguments of counsel and with good cause appearing finds and concludes as follows:

FINDINGS OF FACT

1. During January of 2004, IGT entered into an Industrial Lease Agreement (hereinafter "Lease") with DP Industrial, LLC under the terms of which IGT leased 100,800 square feet of industrial space located at 1150 Trademark Drive, Suite 102, Reno, Nevada, from Dermody Properties. IGT was to use the premises for storing slot machines and other related equipment and the Lease was set to expire on February 27, 2008.

2. During May of 2005 the Lease was amended and extended through June 30, 2008 and incorporated an additional 36,000 square

1 feet of space.

2 3. The Lease was assigned to Prologis by Dermody Properties
3 during July of 2007.

4 4. Subsequent to the assignment of the Lease to Prologis, IGT
5 and Prologis entered into negotiations to extend the Lease. The
6 extension was incorporated in a Second Amendment to the Lease
7 (hereafter "Second Amendment"). Robert Stecker negotiated on
8 behalf of IGT and Travis Durfee negotiated on behalf of Prologis.

9 5. The relevant portion of the Second Amendment related to an
10 early termination option. IGT proposed that the Lease contain an
11 early termination option along with an extension of the term of the
12 Lease for an additional five years. IGT proposed the extended term
13 in order to obtain a lower rental rate. Mr. Stecker proposed the
14 early termination option and requested that it be included in the
15 Second Amendment. The evidence established that IGT wanted the
16 early termination option so it would have the ability to move out
17 early in the event it was able to secure space at another location
18 where IGT had existing facilities. This was an important provision
19 to IGT. Prologis was reluctant to have the early termination
20 included in the Lease but ultimately agreed to the extension and
21 the early termination provision. The relevant language is as
22 follows:

23 "Provided no event of default shall then exist and no
24 condition shall then exist which with the passage of time or
25 giving of notice or both would constitute an event of default,
26 Tenants shall have the right at any time on or before May 1,
2010, to send Landlord written notice (the "Termination

1 Notice") that Tenant has elected to terminate this lease
2 effective on June 30, 2010.

3 If Tenant elects to terminate this Lease pursuant to the
4 immediately preceding sentence, the effectiveness of such
5 termination shall be conditioned upon Tenant paying to
6 Landlord \$370,560 contemporaneously with Tenant's delivery of
7 the Termination Notice to Landlord. Such amount is
8 consideration for Tenant's option to terminate and shall not
9 be applied to rent or any other obligation of Tenant.
10 Landlord and Tenant shall be relieved of all obligations
11 accruing under this Lease after the effective date of such
12 termination but not any obligations under the Lease prior to
13 the effective date of such termination." (Trial Exhibit 6).

14 6. Both Prologis and IGT are large sophisticated corporations
15 with legal departments. The Second Amendment was adopted after it
16 was reviewed by Prologis' legal department and IGT's legal
17 department. Mr. Stecker was aware of the terms of the early
18 termination provision including the obligation to send such notice
19 in writing and contemporaneously paying the \$370,560.00 because he
20 was involved in drafting the provision and specifically requested
21 the provision on behalf of IGT.

22 7. The Second Amendment to the Lease was adopted on June 9,
23 2008.

24 8. The Lease during all relevant times expressly contained a
25 provision that "time is of the essence of each term and provision
26 of this Lease." This is contained in Section 38.04 of the original
Lease. The termination option described above was subject to the
"time is of the essence" provision.

9. IGT's representative, in all of these negotiations as to
all matters involving the construction and implementation of the

1 terms of the Lease and the Second Amendment, was Mr. Stecker. He
2 was fully aware that under the terms of the Lease the notice and
3 payment were due on or before May 1, 2010 and the notice had to be
4 given in writing and time was of the essence.

5 10. During February or March of 2010, Mr. Stecker contacted
6 Mr. Durfee and verbally advised him that IGT was going to elect to
7 terminate the Lease effective on June 30, 2010. While Mr. Stecker
8 offered to tender the written termination notice he was not
9 prepared on behalf of IGT to send the \$370,560.00 termination
10 payment along with the termination notice at that time. Mr.
11 Stecker testified that he was not prepared to tender the
12 termination fee as IGT did not wish to make the payment until
13 closer to the May 1, 2010 date. The court is persuaded from the
14 evidence that IGT made a deliberate decision to hold the early
15 termination notice and the payment so that it could collect
16 additional interest on the money.

17 11. Mr. Durfee, on behalf of Prologis, after receiving the
18 verbal communication from Mr. Stecker advised Brandon Page,
19 Prologis' Market Officer, that IGT was planning to exercise its
20 termination rights. Mr. Durfee also advised Mr. Stecker that he
21 should not send the written termination notice until he was
22 prepared to tender the payment as required by the terms of the
23 Lease as amended.

24 12. As a consequence of the verbal representation that IGT
25 planned to vacate the premises within a few months, Mr. Page

1 directed the property manager to send a standard move-out form
2 letter to IGT. This was accomplished on March 11, 2010. This is
3 the same move-out letter which Prologis sends to every tenant prior
4 to the end of a lease. The court specifically finds and concludes
5 that this form letter did not constitute any acknowledgment or
6 acquiescence or agreement by IGT that a verbal notice of IGT's
7 intention to exercise its early termination option would replace
8 the requirement of a written termination notice together with the
9 early termination payment.

10 13. It is clear that by early March, 2010, IGT had made the
11 decision that it was going to terminate the Lease early and was
12 committed to terminating the Lease regardless of any actions taken
13 by Prologis. Edwin Strickland was designated by IGT to manage all
14 aspects of the construction and demolition work that would be
15 required by IGT to leave the Prologis property. He worked with
16 Prologis employees in the Spring of 2010 to prepare demolition
17 plans for the tenant improvements that IGT had made to the Prologis
18 property.

19 14. On March 11, 2010, Prologis' Property Manager Alisa Weber
20 sent IGT a pending move-out checklist. One of the things the move-
21 out checklist provided for was a preliminary inspection of the
22 property. It also provided IGT with a number of tasks that were
23 going to be required to be performed in advance of the Lease
24 expiration date including making various repairs to the property
25 and turning over the keys to the property to Prologis.

1 15. Prior to May 12, 2010, IGT and Prologis participated in
2 two inspections of the premises in anticipation of the move-out.
3 The termination notice was not discussed during the inspections.
4 Prologis had an obligation under the terms of the Lease to
5 facilitate IGT's move-out and re-letting of the premises and
6 Prologis' participation in the move-out discussions were strictly
7 pursuant to the non-binding oral indications by IGT that it
8 intended to vacate the premises early.

9 16. On April 22, 2010, IGT provided Prologis with its tenant
10 improvement drawings of the offices IGT constructed at the leased
11 premises.

12 17. Through no fault of Prologis, IGT negligently failed to
13 provide Prologis with the written notice of termination or with the
14 \$370,560.00 specified in the Second Amendment to the Lease on or
15 before May 1, 2010.

16 18. On May 5, 2010, Prologis returned the drawings to IGT
17 along with a tentative demolition plan. At that time, Prologis was
18 unaware that IGT had failed to tender its written termination
19 notice or the termination fee on or before May 1, 2010 as required
20 for early termination under the terms of the Lease.

21 19. It was not until May 11, 2010, that Mr. Stecker, on
22 behalf of IGT, realized he had missed the May 1, 2010 deadline
23 because he had "forgotten the date". He testified that it was a
24 mistake on his part to fail to comply with the express terms of the
25 Lease and tender the money and the written notification of
26

1 termination.

2 20. Mr. Stecker notified Mr. Durfee that he had made a
3 mistake in not complying with the deadline for early termination in
4 accordance with the terms of the Lease. He did so after he had
5 spoken with his supervisor, Mr. Ciorciari.

6 21. When Mr. Stecker spoke with Mr. Durfee about the failure
7 to execute the early termination in accordance with the Lease he
8 advised Mr. Durfee that IGT would send the payment and written
9 notice to Prologis the following day. Mr. Durfee indicated to Mr.
10 Stecker that while he was surprised at the missed deadline he
11 needed to confer with his superiors and that Mr. Stecker should not
12 deliver the written notice and payment until he had an opportunity
13 to review the Lease and consult with management.

14 22. On May 12, 2010, Mr. Stecker prepared a letter to
15 Prologis in which he stated that the letter represented "formal
16 notification" that IGT was exercising its early termination option.
17 Mr. Stecker intended that this letter be the written notification
18 under the Second Amendment as no previous written termination
19 notification had been given by IGT to Prologis. That letter was
20 never sent to Prologis. Instead on May 12, 2010, Mr. Strickland e-
21 mailed Mr. Durfee seeking direction on certain demolition issues in
22 an effort to keep the demolition work on schedule and "as painless
23 as possible."

24 23. Mr. Stecker sent Mr. Durfee an e-mail on May 14, 2010
25 offering to have IGT's written notice and payment delivered to
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1 Prologis until Prologis could come to a decision. Mr. Durfee
2 advised Mr. Stecker to hold the notice and payment because he could
3 not accept them until a decision had been made by Prologis'
4 management.

5 24. Mr. Stecker acknowledged that he had not calendared the
6 deadline and he did not know of anyone else within the IGT
7 organization who had calendared the deadline for giving written
8 notification and the payment pursuant to the terms of the Lease.

9 25. The evidence showed that Mr. Stecker had signed copies of
10 the Lease as did IGT's legal department and compliance department.
11 The testimony established that IGT did not have a routine procedure
12 or methodology for calendaring deadline dates like the termination
13 notice contained in the Lease.

14 26. At no time did any representative of Prologis ever lead
15 Mr. Stecker to believe that he did not need to send a formal
16 written termination notice in accordance with the terms of the
17 Lease. And, at no time did any representative of Prologis ever
18 lead Mr. Stecker to believe that he was not required to tender the
19 payment in the amount required under the Lease prior to the May 1,
20 2010 deadline.

21 27. On May 19, 2010, IGT's legal department prepared a letter
22 which was hand-delivered to Prologis on May 19, 2010 providing
23 written notification of IGT's desire to terminate the Lease.

24 28. While the letter uses the language "previous notices" of
25 termination, the evidence is clear that the only notification was

1 a verbal notification substantially in advance of the May 1, 2010
2 deadline without compliance with the written requirements of
3 notification and the tender of payment for the amount required for
4 early termination.

5 29. On May 24, 2010, Mr. Strickland called Mr. Durfee about
6 the demolition. At that point in time IGT clearly intended to
7 vacate the premises regardless of what Prologis did or did not do
8 in connection with the move-out of IGT. IGT had already prepared
9 office space and warehouse space on its own premises and intended
10 to vacate the premises notwithstanding the dispute involving the
11 early termination provisions of the Lease.

12 30. On May 24, 2010, Mr. Durfee advised IGT that Prologis was
13 not accepting IGT's late termination and was not required to give
14 any direction to proceed with demolition and move-out of IGT as
15 Prologis determined that IGT had not exercised its early
16 termination right in accordance with the provisions of the Lease.
17 IGT was advised by Prologis that it might want to leave the space
18 as-is in case a sub-tenant could use the additional tenant
19 improvements. Although this is disputed, the court is persuaded
20 that Mr. Strickland advised Prologis that IGT would proceed with
21 demolition of all the tenant improvements unless Prologis consulted
22 with IGT in connection with the move-out. This finding is
23 consistent with the fact that IGT intended to vacate the premises
24 notwithstanding its negligent conduct in failing to timely exercise
25 the early termination option.

1 31. Prologis then proceeded to assist IGT in connection with
2 the move-out but did so after expressly indicating that it was not
3 waiving its rights under the terms of the Lease and that Prologis
4 would continue to enforce its rights under the terms of the Lease.

5 32. Although IGT clearly understood that Prologis continued
6 to assert that IGT was not properly vacating the premises and had
7 not complied with the terms for early termination, IGT nevertheless
8 proceeded to take the necessary steps to vacate the premises.

9 33. On May 25, 2010, Prologis sent a letter to IGT returning
10 the check reflecting the payment to IGT and IGT received the check
11 on May 26, 2010. The letter stated that "IGT did not properly
12 exercise its termination option" and "the Lease remains in place."

13 34. On May 27, 2010, Prologis sent IGT an e-mail stating that
14 "Section 42.01 of the First Amendment to Lease, at termination,
15 allows Landlord, at its election, to require IGT to remove all of
16 the Tenant Improvement finished office space at IGT's expense." In
17 that letter, Prologis advised IGT "that the Lease between the two
18 parties has not been terminated, so landlord is not legally
19 required at this time to make any election as to the removal of
20 tenant improvements."

21 35. Nevertheless, Prologis continued to attempt to accommodate
22 IGT in the move-out and assist in preparing the premises for re-
23 letting.

24 36. The court finds and concludes that these actions of
25 Prologis were undertaken in an effort to mitigate any potential
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1 damages because IGT intended to vacate the premises notwithstanding
2 the notifications by Prologis that IGT had failed to comply with
3 the Lease and was legally bound for the remaining term of the
4 Lease. Prologis then proceeded to identify those improvements which
5 it desired to have remain on the premises. Again, Prologis
6 expressly reserved all of its rights under the Lease.

7 37. On May 27, 2010, in its e-mail, Prologis stated "both
8 this e-mail and Prologis' demolition suggestions shall in no way be
9 construed as a waiver of any of landlords legal and contractual
10 rights under the Lease Agreement . . . "

11 38. There is no doubt in the court's mind that IGT and its
12 representatives fully understood that at the time they were
13 vacating the premises in late May, 2010, Prologis reserved all of
14 its rights under the terms of the Lease.

15 39. IGT then proceeded with its demolition work starting on
16 June 7, 2010 and completed the work on June 23, 2010.

17 40. IGT paid \$97,152.00 to demolish its tenant improvements.
18 Even if IGT had occupied the premises for the remainder of the
19 Lease it would have had this obligation to remove the tenant
20 improvements.

21 41. On June 23, 2010, IGT requested a final inspection to
22 confirm that no construction issues remained.

23 42. During the period May 1st to May 26th, 2010, IGT
24 completed a substantial portion of the move of its warehouse
25 property from the Prologis space to IGT's campus on Prototype
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1 Drive.

2 43. At that point in time Prologis reasonably determined that
3 regardless of what it did or did not do, IGT intended to vacate the
4 premises and move all of its operations to its facility on IGT's
5 campus. The demolition work on the premises was reasonably
6 undertaken by both Prologis and IGT in order to mitigate damages in
7 response to IGT's insistence on leaving the property in breach of
8 the Lease even though it had not complied with the provisions of
9 the Lease for early termination.

10 44. On June 24, 2010, Prologis participated in the final
11 inspection of the premises and IGT left the premises on or before
12 June 30, 2010, on which date IGT changed the locks and IGT no
13 longer had access to the building.

14 45. Thereafter IGT failed and refused to pay any rent or
15 other payments as they came due under the terms of the Lease
16 commencing July 1, 2010 and continuing until June 30, 2013, the
17 termination date of the Lease.

18 46. On July 14, 2010, Prologis initiated a summary eviction
19 action under the provisions of Chapter 40 of the Nevada Revised
20 Statutes for IGT's non-payment of the July rent. IGT filed a
21 tenant affidavit on July 21, 2010, contesting Prologis' eviction
22 notice. IGT had no intention of possessing the premises and
23 Prologis re-entered the premises and attempted to secure a
24 replacement tenant. The eviction action was then dismissed by
25 Prologis.

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1 47. On December 6, 2010, Prologis was able to secure a
2 replacement tenant, Laco, Inc., for 36,000 square feet of the
3 premises vacated by IGT.

4 48. Prologis then continued to attempt to re-let the balance
5 of the premises. In so doing, Prologis advertised the listing on
6 LoopNet, which is an on-line listing service for commercial and
7 industrial properties, and in brochure materials which were mailed
8 to parties who made inquiries. Prologis also communicated with
9 various brokers, discussed the premises by word-of-mouth, and
10 posted a generic "notice of property available for lease" on
11 Prologis' property. Prologis also received and considered proposals
12 from potential tenants and prepared counter proposals. Prologis
13 provided IGT with the names of brokers who could assist in locating
14 possible sub-tenants and attempted to accommodate any request by
15 IGT to conduct tours of the premises with potential sub-tenants.

16 49. Prologis was unable to secure a replacement tenant for
17 the balance of the property.

18 50. IGT did not undertake any efforts to find a replacement
19 tenant after it left the property on June 1, 2010.

20 51. Prologis has suffered damages as a result of IGT's
21 failure to comply with the terms of the Lease and is entitled to
22 recover those damages in accordance with the terms of the Lease.
23 Those damages, as of November 18, 2013, amounted to \$2,531,299.00
24 after credit is given for IGT's security deposit, and the rent and
25 other charges received from Laco. This sum represents unpaid base

1 rent in the amount of \$1,844,160.00, operating costs in the amount
2 of \$413,312.00 (this represents a 10% reduction as a result of
3 testimony that created some ambiguity as to actual costs), system
4 replacement fees in the amount of \$64,022.00, accrued interest in
5 the amount of \$566,204.00, the TI allowance for Laco in the amount
6 of \$38,362.00; brokerage commission for Laco in the amount of
7 \$19,972.00 (the sum of \$9,836.00 paid to in-house brokers has been
8 deducted). No allowance has been made for the repairs that were
9 not made and IGT has been given credit for the deposit in the
10 amount of \$40,911.00. Interest will accrue at the contract amount
11 from November 18, 2013 until the date of judgment and thereafter at
12 the rate provided by law. The contract also provides for the
13 prevailing party to recover attorneys' fees and costs.

14 **CONCLUSIONS OF LAW**

15 1. Prologis is a corporation organized under the laws of
16 Delaware and has its principal place of business in Colorado.

17 2. IGT is a corporation organized under the laws of the State
18 of Nevada and has its principal place of business in Nevada.

19 3. This court has jurisdiction pursuant to 28 U.S.C. § 1332
20 and venue properly lies in the district of Nevada.

21 4. The lease entered into by Prologis and IGT specifically
22 provides that it is to be governed by and construed in accordance
23 with the laws of the State of Nevada.

24 5. Because the court is exercising diversity jurisdiction,
25 Nevada substantive law governs this action. Erie R.R. Co. v.

1 Thompkins, 304 U.S. 64, 78 (1938); Nitco Holding Corp. V.
2 Boujikian, 491 F.3d 1086, 1089 (9th Cir. 2007).

3 6. In determining the intent of the parties the court looks
4 to the plain language of the contract. If the contract is clear
5 the court will enforce the provisions even if the application of
6 those conditions seems harsh or unfair. Cummings v. Bullock, 367
7 F.2d 182, 186 (9th Cir. 1966).

8 7. The dispute that resulted in this litigation involves the
9 failure of IGT to comply with the early termination provision
10 contained in the Lease. That provision states:

11 Tenant shall have the right at any time on or before
12 May 1, 2010 to send Landlord written notice (the "Termination
13 Notice") that Tenant has elected to terminate this Lease
effective on June 30, 2010.

14 If Tenant elects to terminate this Lease pursuant to the
15 immediately preceding sentence, the effectiveness of such
16 termination shall be conditioned upon Tenant paying to
Landlord \$370,560.00 contemporaneously with Tenant's delivery
of the Termination Notice to Landlord. (Trial Exhibit 6).

17 8. In addition the Lease explicitly provided in Section 38.04
18 that time is of the essence in the performance of its terms.
19 Therefore, IGT was required to provide Prologis with written notice
20 of its intention to exercise its early termination option,
21 contemporaneously with payment in the amount of \$370,560.00 on or
22 before May 1, 2010.

23 9. It is undisputed that IGT did not deliver its written
24 Termination Notice and payment to Prologis on May 1, 2010. Under
25 the express terms of the contract IGT failed to comply with the

1 terms of its early termination option. Because IGT failed to
2 exercise its right in a timely manner it lost its right to
3 terminate the Lease early and therefore IGT's lease obligations
4 continued through the end of the stated lease term, that is June
5 30, 2013.

6 10. If a lease option provides a tenant with a unilateral
7 option and time is of the essence in such an option contract the
8 tenant is required to strictly comply with the terms of the option.
9 G.S. Johnson Co. v. Nevada Packard Mines Co., 272 F. at 291, 296
10 (D.Nev. 1920); McCall v. Carson, 172 P.2d 171, 185 (Nev. 1946).
11 Substantial compliance is not sufficient. White v. Miller, 518 S.
12 W. 2d 383, 385 (Tex. Ct. App. 1974) (timely verbal notice
13 insufficient where option required written notice). Exact
14 compliance with an option contract's terms is stringently enforced.
15 Cummings v. Bullock, 367 F.2d 182, 186 (9th Cir. 1966). In
16 discussing the substantial compliance doctrine the Nevada Supreme
17 Court has held as follows:

18 The optionor, before acceptance by the optionee, is bound
19 only to the extent that he has expressly agreed to be bound.
20 The obligation on his part is a mere offer, requiring
21 unconditional acceptance in order that a contract may be
22 created. If it were construed otherwise, an optionee could
23 change the time specified for the payment of money, or impose
24 conditions not contemplated by the parties at the time the
agreement was entered into, and thereby, without the
optionor's consent, foist a so-called contract upon him to
which he had not agreed. Fundamentally, the law of contracts
does not permit this, as there must be mutuality of consent to
all the provisions - a meeting of the minds - in order that a
contract may be created.

25 McCall, 172 P.2d at 185; see also Cummings, 367 F.2d at 186.

1 11. These same rules apply to early termination options in
2 commercial leases. Loitherstein v. IBM, 413 N.E.2d 1146 (Mass.
3 App. Ct. 1980) (where sophisticated parties carefully chose clear
4 option language, landlord properly rejected tenant's attempted
5 early termination where notice of termination was 23 days early,
6 but termination fee was 5 days late).

7 12. Here both Prologis and IGT are sophisticated parties.
8 They both have legal departments. The early termination provision
9 was added to the Lease for the benefit of IGT and IGT clearly
10 understood its legal obligations to exercise the early termination
11 provision in writing with a simultaneous payment of \$370,560.00.

12 13. While IGT seeks equitable relief from the court for
13 missing the option deadline, Nevada law does not permit such relief
14 under the circumstances of this case. The Nevada Supreme Court has
15 held that equity will not intervene to protect a lessee from its
16 own negligent failure to give the required written option notice.
17 Host International, Inc. v. Summa Corp., 583 P.2d 1080 (Nev. 1978).
18 See also Holmby, Inc. v. Dino, 647 P.2d 392, 393-94 (Nev. 1982).

19 14. The language of the termination option is clear and
20 unambiguous. IGT was entitled to terminate the Lease only if it
21 provided written notice of its election on or before May 1, 2010
22 and contemporaneously with the written termination notice tendered
23 the termination fee of \$370,560.00 to Prologis. Early verbal
24 notification of the termination was insufficient as a matter of law
25 to exercise the early termination provision. In addition, it is
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1 clear that the fault for failing to give the notice was clearly
2 IGT's negligence and the motivation for not tendering the
3 \$370,560.00 was IGT's business decision to retain the funds so they
4 could draw interest beneficial to IGT.

5 15. Equity will not intervene to protect the lessee from its
6 own negligent failure to give the required written notice. Host,
7 583 P.2d at 1082. Therefore, IGT's argument of substantial
8 compliance is unavailing under the facts of this case.

9 16. As an affirmative defense IGT argues that Prologis waived
10 its right to enforce the early termination provision under the
11 Lease. IGT bears the burden of proving an existing right, a
12 knowledge of its existence, and an actual intention to relinquish
13 it or conduct so inconsistent with the intent to enforce the right
14 as to induce a reasonable belief that it has been relinquished.
15 Baroi v. Platinum Condo Development, LLC, No. 2:09-cv-00671, 2012
16 U.S. Dist LEXIS (D. Nev., 2012). Further, a waiver is not effective
17 unless done with full knowledge of all its material facts. In
18 addition, to prove waiver by conduct, which is the theory advanced
19 by IGT, Prologis' conduct must be so manifestly consistent with an
20 intent to relinquish voluntarily a particular right that no other
21 reasonable explanation of one's conduct is possible. In re Spats
22 Restaurant & Saloon, 64 B.R. 442, 446 (Bankr. D. Nev. 1986).

23 17. The court concludes that Prologis did not waive strict
24 compliance with the Second Amendment to the Lease when Mr. Durfee
25 advised Mr. Stecker in March of 2010 that he should not send the

1 termination notice until he also sent the termination fee precisely
2 in accordance with the clear language of the Second Amendment.
3 This unequivocally established that Prologis was insisting on
4 strict compliance with the terms of the option. Therefore, Mr.
5 Stecker's March 2010 verbal inquiry was not a proper exercise of
6 the termination option. The verbal inquiry was legally
7 insufficient to satisfy the requirements of the early termination
8 option.

9 18. In addition, the court concludes that Prologis did not
10 intend to nor did it ever waive strict compliance with the terms of
11 the option when it conducted inspections of the premises, provided
12 demolition instructions to IGT and commenced efforts to market the
13 premises prior to May 1, 2010. Prior to that date and because of
14 IGT's verbal indication that it expected to exercise its option for
15 early termination, Prologis had a reasonable expectation that IGT
16 would eventually, prior to May 1, 2010, provide the timely
17 termination option and payment in accordance with the provisions of
18 the Lease. The conduct of Prologis prior to the May 1, 2010
19 deadline was consistent with reasonable business practices to
20 prepare for the termination in the event compliance with the
21 written termination was provided by IGT. Such conduct did not
22 constitute an intention to waive rights nor did it induce a
23 reasonable belief in IGT that Prologis was waiving its right to
24 require strict compliance with the early termination provisions of
25 the Lease.

1 19. In addition, the court concludes that when Prologis
2 returned the tentative demolition plans to IGT on May 5, 2010 and
3 conducted the inspection on May 7, 2010, after the May 1, 2010
4 deadline, such conduct was undertaken as a result of the mistaken
5 belief by Prologis that IGT had complied with the written notice
6 requirements. Prologis as a commercial landlord had no legal
7 obligation to notify IGT of the pending or missed option deadline.
8 See Warminster Equities, LLC. Warminster Commerce, LLC, No. 11-
9 3238, 2012 U.S. App. LEXIS 19645 (3d Cir. Sept 19, 2012). There
10 was no requirement in the Lease that Prologis had any duty to
11 notify IGT of noncompliance with the early termination provisions
12 or the payment of the termination fee. The court concludes that
13 these actions of Prologis were not intended as a waiver of any of
14 Prologis' rights under the Lease in relation IGT's early
15 termination option. The court concludes that this conduct did not
16 constitute an express or implied waiver and does not warrant
17 equitable relief.

18 20. The conduct of Prologis in late May of 2010 in providing
19 IGT with direction on what tenant improvements to leave on the
20 premises, inspecting the premises and providing input on the
21 demolition work did not constitute a waiver. IGT made it very
22 clear to Prologis, even though it missed the May 1, 2010 deadline
23 for exercising the early termination, that it intended to vacate
24 the premises and abandon the Lease because it had constructed
25 facilities on its own campus and that it was therefore going to

1 move regardless of Prologis' conduct. IGT clearly understood from
2 both written and verbal communications by Prologis that Prologis
3 intended to enforce its rights under the express terms of the
4 Lease. Under such circumstances it was not unreasonable for
5 Prologis to work with IGT in restoring the premises to a condition
6 where Prologis would be able to make reasonable efforts to re-let
7 the premises to another tenant once IGT vacated the property.
8 Prologis had a reasonable concern that if it did not provide
9 direction to IGT, IGT would simply remove all of the improvements
10 and leave the premises in a condition that would make it more
11 difficult for Prologis to attempt to mitigate its damages by re-
12 letting the property. Prologis had an obligation under the Lease
13 to act in good faith in cooperating with IGT and had a further
14 obligation to undertake a reasonable good faith effort to mitigate
15 its damages under both the provisions of the Lease and the
16 provisions of NRS 118.175.

17 21. Under the facts presented during the trial the court is
18 persuaded that it was IGT, not Prologis, who insisted on the move-
19 out and on demolition direction from Prologis, because IGT intended
20 to vacate the premises even though it had negligently failed to
21 comply with the provisions of the early termination section of the
22 Lease.

23 22. For these reasons, the court specifically finds and
24 concludes that the evidence established that Prologis' post-May 1,
25 2010 conduct does not support a finding of waiver, either express

1 or implied. Prologis cooperated with IGT in connection with the
2 demolition work in order to mitigate its damages by helping to
3 restore the facility to a condition that would maximize the
4 marketability of the property and enhance the prospect of securing
5 new tenants once the property was vacated by IGT. The Lease
6 provides that nothing undertaken by Prologis to mitigate damages
7 shall waive Prologis' right to recover damages against IGT.
8 Sections 20.01 and 20.03. It further provides that "whether the
9 premises or any part thereof is a re-let" IGT shall remain liable
10 under the Lease. Section 20.03 (B). Here Prologis had a duty to
11 make reasonable efforts to re-let once it understood that IGT was
12 going to vacate the premises even though it had been advised not to
13 do so because of the failure to comply with the early termination
14 provision. The remodeling and re-letting efforts did not constitute
15 a waiver of Prologis' rights to reject the late tender by IGT of the
16 payment and written termination notice. Accordingly, the court
17 concludes there was no express or implied waiver of the early
18 termination provisions of the Lease by Prologis during any of its
19 pre- or post-May 1, 2010 conduct. At all times Prologis reserved
20 its rights under the Lease and expressly disclaimed an intention to
21 waive any rights in all of its communications with IGT. Nor did
22 Prologis' conduct for the reasons set forth above support IGT's
23 defense of estoppel, breach of the covenant of good faith and fair
24 dealing, or surrender and acceptance. Therefore the court
25 concludes that IGT has failed to meet its burden in establishing an
26

1 entitlement to recover on its defenses of substantial performance,
2 waiver, estoppel, breach of the covenant of good faith and fair
3 dealing, and surrender and acceptance.

4 23. Finally the court concludes that Prologis used reasonable
5 efforts to mitigate its damages. Prologis was able to secure a
6 replacement tenant (Laco) for a portion of the premises within
7 approximately six months of IGT's abandonment of the property. The
8 only evidence provided at trial relating to the reasonableness of
9 Prologis' mitigation efforts was evidence provided by Prologis.
10 IGT offered no evidence, such as expert testimony, that the efforts
11 of Prologis in attempting to secure new tenants fell below the
12 standard of reasonableness. IGT had an obligation to show that
13 Prologis' mitigation efforts were unreasonable. The efforts
14 undertaken by Prologis to re-let the premises included listing the
15 premises on the commercial MLS service, providing mass e-mailings
16 to local brokers, using in-house brokers, and submitting brochures
17 and erecting business park signage. Those were the usual and
18 customary steps Prologis took on a regular basis to lease its other
19 properties. These were reasonable and customary steps in the
20 commercial marketplace. Therefore, the court concludes that
21 Prologis took reasonable mitigation steps in an effort to re-let
22 the premises after the premises were vacated by IGT. While it
23 might have been preferable to hire an outside broker, there is no
24 indication in the record that doing so would have assisted in the
25 re-letting of the premises, particularly in the severely depressed

1 commercial real estate market that existed at the time. In
2 addition, the fact that Prologis was able to secure a new tenant
3 for a portion of the property provides further support for the
4 conclusion that Prologis used reasonable efforts to re-let the
5 premises.

6 24. On the issue of damages the court finds and concludes
7 that Prologis is entitled to recover damages against IGT as set
8 forth in the Lease from the time that IGT left the premises until
9 the expiration of the Lease on June 30, 2013.

10 25. The court finds that IGT's failure to properly exercise
11 its termination option resulted in the Lease continuing through
12 June 30, 2013. IGT continued to owe rent under the terms of the
13 Lease and was otherwise obligated to comply with the terms of the
14 Lease through the end of the term on June 30, 2013. Therefore,
15 Prologis is entitled to a declaratory judgment that IGT failed to
16 comply with the required conditions for exercising its termination
17 option and therefore the option was not properly exercised; that
18 the Lease continued as a valid and enforceable contract on and
19 after July 1, 2010 such that IGT continued to owe the rentals and
20 other charges under the Lease through June 30, 2013. The total sum
21 owed under the terms of the Lease by IGT to Prologis through the
22 end of the Lease term was in the amount of \$2,531,299.00. (See
23 Paragraph 52 of the court's Findings of Fact).

24 26. The court also finds and concludes that IGT breached the
25 Lease by failing to properly exercise the early termination
26

1 provision and by failing to pay the rent and other charges after
2 July 1, 2010. The Lease obligated IGT to pay all rent and
3 obligations in a timely manner. IGT failed to pay any rent or
4 other charges after July 1, 2010.

5 27. Prologis properly notified IGT of its breach and IGT
6 refused to take any corrective action.

7 28. Prologis performed all of its obligations and satisfied
8 all of its conditions under the Lease.

9 29. Prologis made reasonable efforts to mitigate its damages
10 once IGT left the premises.

11 30. IGT has failed to carry its burden on any of its defenses
12 to Prologis' claims.

13 31. As a consequence of IGT's breach of the Lease, Prologis
14 suffered damages and is entitled to an award of damages for breach
15 of contract in the amount of \$2,531,299.00 (reflecting damages
16 through November 18, 2013). These damages shall bear interest in
17 the contract amount from November 18, 2013 until the date of entry
18 of judgment and thereafter at the rate provided by law.¹ (See
19

20 ¹As a general rule, in diversity actions, state law determines
21 the rate of prejudgment interest and post-judgment interest is
22 governed by federal law. Citicorp Real Estate, Inc. v. Smith, 155 F3d
23 1097 (9th Cir. 1998). See 28 U.S.C. § 1961. An exception to § 1961
24 exists when the parties contractually agree to waive its application.
25 Fid. Fed. Bank, FSB v. Durga Ma Corp., 387 F3d 1021, 1023 (9th Cir.
26 2004). Here the Lease does not include a provision reflecting any
intent of the parties to waive the application of § 1961 to post-
judgment awards. See Cataphora, Inc. v. Parker, 848 F.Supp. 2d 1064,
1074-75 (D.Nev. 2012). Therefore the federal statutory rate of
interest shall apply post-judgment to the amount awarded.

Paragraph 52 of the court's Findings of Fact).

32. The court further concludes that Prologis is entitled to an award of costs and attorneys' fees as the prevailing party in accordance with the provisions of Section 22 in the Lease.

33. Prologis shall submit to the court its bill of costs and affidavits in support of reasonable attorneys' fees on or before March 1, 2014. The Clerk of Court will then tax costs. Any objection to the taxation of costs shall be filed within 20 days of the taxation of costs by the Clerk. Any objections to Prologis' request for attorneys' fees shall be filed within 20 days after the filing of Prologis' request for fees. Should either party object to the award of interest post judgment based on the legal rate rather than the contract rate, such objections should be filed in writing by March 1, 2014.

34. The Clerk of Court shall enter a judgment consistent with these Findings of Fact and Conclusions of Law and Order.

It is so ordered.

Dated this 29th day of January, 2014.



Honorable Howard D. McKibben
Sr. United States District Judge